CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 419

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARY M. HUTCHINGS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1940
CERTIORARI GRANTED OCTOBER 28, 1940

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1938

Sept. 5—Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.

Sept. 12—Proof of service filed by taxpayer.

Sept. 23—Praecipe for record filed by taxpayer. 10/2/39 1 copy received.

Sept. 26—Proof of service of praecipe filed. 10/2/39 1 copy received.

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2 PETITION.

Filed Sept. 7, 1938.

(Title Omitted.)

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency MT-ET-GT-230-35-1st Texas, dated June 10, 1938, and as basis of her proceedings alleges as follows:

1. The petitioner is an individual and resides at 2805 Avenue O, Galveston, Texas.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on or about June 10, 1938.

3. The taxes in controversy are gift taxes for the year 1935 and in the amount of $2,981.05.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner refused to allow but one $5,000.00 exclusion for a gift in trust to her seven children whereas he should have allowed seven exclusions of $5,000.00 each, or $35,000.00.

3 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On or about December 30, 1935 the petitioner was the owner in an undivided interest of a large number of tracts of land which she inherited from her father W. L. Moody, Sr. and from her mother, Mrs. Phœbe Elizabeth Moody. The petitioner's sever children were also owners of certain undivided interests in the same tracts of land, they also having inherited said lands. The lands were not susceptible of partition and division. On or about December 30, 1935 petitioner conveyed all of her undivided interest in and to said lands to two of her children, viz: Robert K. Hutchings and John Hutchings, as trustees for the benefit of her said seven children, all to share and share alike in said trust. Petitioner alleges there were seven donees instead of one and that seven exclusions should have been allowed.

Wherefore, the petitioner prays that this Board hear the proceeding and allow to the petitioner the seven exclusions of $5,000.00 each, or $35,000.00.

(s) MRS. MARY M. HUTCHINGS,
Petitioner.

2805 Avenue O,
Galveston, Texas.

The State of Texas,
County of Galveston

Mrs. Mary M. Hutchings, being duly sworn says that she is the petitioner above named; that she has read the foregoing petition, or has had the same read to her, and is fa-

miliar with the statements contained therein, and that the statements contained therein are true.

(s) MRS. MARY M. HUTCHINGS.

Subscribed and sworn to before me this the 6th day of September, A. D. 1938.

(s) T. W. LAIN,
Notary Public in and for Galveston County, Texas.

4

Treasury Department
Washington

June 10, 1938.

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to
MT-ET-GT-230-35-1st Texas

Donor—Mary M. Hutchings.

Mrs. Mary M. Hutchings,
2805 Avenue O,
Galveston, Texas.

Madam:

A deficiency of $2,981.05 in your Federal gift tax liability for the calendar year 1935 has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the copies of the letters attached.

This notice of deficiency is given in accordance with the provisions of Section 513 (a) of the Revenue Act of 1932

as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890A, waiving the restrictions on the immediate assesment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit you by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890A, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,
GUY T. HELVERING,
Commissioner,
By D. S. BLISS,
Deputy Comm'r.

Enclosures:
Waiver, Form 890A.
Copies of Letters.

5 An examination of the return discloses the following:

	Returned	Tentatively Determined
Total gifts, 1935	$118,065.00	$144,970.34
Less exclusions	35,000.00	5,000.00
Amount included	83,065.00	$139,970.34
Less specific exemption	50,000.00	50,000.00
Net Gifts	$ 33,065.00	$ 89,970.34
Tax on net gifts	564.94*	3,523.00
Tax assessed on return		541.95
Deficiency		$ 2,981.05

*Should be $541.95.

The deficiency bears interest at the rate of six per cent per annum from the due date of the tax, March 15, 1936, to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

Schedule A.

1,000 shares Moody Cotton Company	1.00	10,000.00
Interest in real estate	118,064.00	119,745.34
Interest in mineral rights	0.00	15,225.00

	Tentatively Determined	Returned
Exclusions	5,000.00	35,000.00
To balance (amount of increase)	56,905.34	

Inasmuch as the trust to which the gifts were made is considered to be one donee, only one exclusion therefor may be allowed.

The payment of $22.99, which is being held by the Collector in his suspense account, will be taken into consideration by him in the final adjustment of the amount of tax and interest due.

Respectfully,
(s) D. S. BLISS,
Deputy Commissioner.

Enclosure:
Waiver.

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6 ANSWER.

Filed Oct. 4, 1938.

(Title Omitted.)

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4 (a). Denies that respondent's determination is based on errors as alleged in subparagraph (a) of paragraph 4 of the petition.

5 (a). Denies the material allegations of fact set forth in subparagraph (a) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissoiner's determination of deficiency be approved.

(s) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
JAMES H. YEATMAN,
Special Attorney,
Bureau of Internal Revenue.

7 United States Board of Tax Appeals.

Mary M. Hutchings, Petitioner
vs.
Commissioner of Internal Revenue, Respondent.

Docket No. 95359. Promulgated June 6, 1939.

Petitioner, as doner, created an irrevocable trust for a term of years, to which she transferred her entire interest in certain described properties for the use and benefit of her seven children. *Held*, petitioner is entitled to one exclusion of $5,000 in determining the amount of her gift subject to the gift tax.

I. M. Tullar, Esq., for the respondent.

This proceeding involves a deficiency in gift tax for 1935 in the amount of $2,981.05. In determining the deficiency the respondent allowed one exclusion of $5,000 upon the theory that petitioner's transfer to the trust was a

transfer to one donee. The petitioner contends that since there were seven beneficiaries she is entitled to a total exclusion of $35,000. The parties submitted the proceeding upon an agreed stipulation of facts, so that the only question remaining is whether, as a matter of facts, so that the only question remaining is whether, as a matter of law, petitioner is entitled to one exclusion of $5,000 or seven exclusions of $5,000.

FINDINGS OF FACT.

The petitioner resides in Galveston, Texas. On December 30, 1935, she executed an indenture of trust in which she was joined *pro forma* by her husband. The instrument recites that the grantor desired to "convey, assign, transfer and deliver to the Trustees certain real estate, personal property and securities hereinafter described for the purpose of creating a *voluntary living trust.*" (Emphasis supplied.) The property conveyed was "all of the Grantor's right, title, interest and estate" in the described personal and real properties, and was valued by respondent at $144,970.34, which value is not disputed by the petitioner.

The trustees were to hold the property in trust for the use and benefit of the grantor's seven children and in their sole and absolute discretion could hold and accumulate the entire net income, interest, rents, profits, and revenues of the trust corpus, or distribute the same according to the respective interests of the beneficiaries, who were to share and share alike in all distributions and payments of either principal or income. In the event of the death of a beneficiary prior to the termination of the trust, his or her interest was to go to the person or persons designated in the will of the deceased beneficiary, and in default of appointment "his or her interest in the trust estate" vested in the deceased beneficiary's heirs at

law as determined by the law of descent and distribution of Texas.

Paragraph six of the trust agreement provides:

> Neither the principal nor the income of the trust shall ever be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure by any creditor of any such beneficiary under any writ or proceedng at law or in equity, and no such beneficiary shall have power to sell, assign, transfer, convey, encumber, or in any other manner dispose of or anticipate the disposition of his or her interest in the trust property, or the income to be produced thereby, or any divisions or distributions thereof.

The trust was to terminate March 1, 1957, unless sooner terminated by final division and distribution of the trust property. Upon termination of the trust any and all property was to be paid over and delivered to the then beneficiaries according to their respective interests. In paragraph numbered twelve the trust indenture provides as follows:

> The Grantor shall have no power to revoke *the trust created hereby,* in whole or in part, nor shall she have the power to revest in herself any part of the principal of the trust, nor any part of the income thereof, or therefrom. [Emphasis supplied.]

In arriving at the deficiency asserted in this cause the respondent allowed a specific exemption of $50,000 and one exclusion of $5,000.

OPINION.

ARNOLD:

Section 501 (a) of the Revenue Act of 1932 imposes a tax upon the *transfer* by any individual, resident or nonresident, of property by gift. Section 501 (b) of that act provides that the tax shall apply whether the *transfer* is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Section 504 (b) of the same act provides that the first $5,000 of gifts made "to any person" shall not be included in the total amount of gifts made during the taxable year. Section 1111 of the 1932 Act, in defining the term "person," provides that it shall mean *inter alia* "a trust."

In *Seymour H. Knox*, 36 B. T. A. 630, we considered the question here presented and held that for the purpose of the $5,000 exclusion the trust, as an entity, was the "person" within the meaning of Section 504 (b). In so deciding we cited and relied upon *Commissioner* vs. *Wells* (C. C. A., 7th Cir.), 88 Fed. (2d) 339, affirming 34 B. T. A. 315; *Commissioner* vs. *Krebs* (C. C. A., 3d Cir.), 90 Fed. (2d) 880, affirming a memorandum opinion of this Board; and *Noyes* vs. *Hassett*, 20 Fed. Supp. 31. Subsequent decisions of this Board have followed the principle announced in the *Knox* case, *supra*, and in a recent decision of the Circuit Court of Appeals for the Eighth Circuit, *Robertson* vs. *Nee*, — Fed. (2d) — (Mar. 6, 1939), it was held that a transfer in trust in 1935 to one trustee was entitled to only one $5,000 exclusion since only one trust was created. The Court so decided despite the specific provisions of the trust indenture providing for the division of the trust estate into three parts and naming the wife and the two children of the grantor as beneficiaries, each being entitled to the income and principal of one of the parts of the trust estate.

In *Welch* vs. *Davidson*, 102 Fed. (2) 100, the Circuit Court of Appeals for the First Circuit reached the opposite con-

clusion, and was followed by the United States District Court for the Northern District of Illinois in *Ryerson* vs. *United States*, — Fed. Supp. — (Mar. 31, 1939). Despite our respect for the opinion of the Circuit Court of Appeals for the First Circuit and the opinion of the Federal District Court which followed the First Circuit, we feel obliged to follow the rule laid down in *Seymour H. Knox, supra*, and in *Robertson* vs. *Nee, supra*.

The facts in the instant proceeding are on all fours with the facts in the *Robertson* case. The trust here created was clearly intended to be a single trust with seven beneficiaries who were to share equally in the trust income and principal. Every reference in the trust indenture points to an intent and purpose to create a single trust estate for the distribution of income and corpus among the several beneficiaries. We hold, therefore, that the property was transferred to the trust as an entity, and that petitioner is entitled to but one exclusion of $5,000 as determined by the respondent.

Decision will be entered for the respondent.

10 DECISION.

United States Board of Tax Appeals
Washington

Mary M. Hutchings, Petitioner,
vs. Docket No. 95359
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Board, as set forth in its report promulgated June 6, 1939, it is

Ordered and Decided: That there is a deficiency in gift tax in the amount of $2,981.05 for the year 1935.

Enter:

(s) C. R. ARUNDELL,
Member.

Entered June 6, 1939.

PETITION FOR REVIEW IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND ASSIGNMENTS OF ERROR.

Received Sep. 5, 1939.

Filed Sep. 5, 1939.

(Title Omitted.)

Now comes Mary M. Hutchings, hereinafter called "petitioner," and would respectfully show:

1.

That she is an individual, a citizen of the United States, and an inhabitant of the State of Texas which is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit; that more particularly, her residence is 2805 Avenue O, Galveston, Texas; that respondent, Guy T. Helvering, is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States.

2.

That the nature of the controversy is as follows:

On December 30, 1935, petitioner, Mary M. Hutchings, executed an indenture of trust, conveying certain property to Trustees named therein for the use and benefit of her seven (7) children who were to share equally in all distributions of payments of either principal or income. In her gift tax return for the calendar year 1935, petitioner claimed an exclusion of $35,000.00 upon the theory that the transfer constituted seven different gifts to each of her seven children, and she was entitled to

a $5,000.00 exclusion for each of them, or a total exclusion of $35,000.00. Respondent, however, allowed only one exclusion of $5,000.00 upon the theory that the transfer was to one donee and on June 10, 1938, determined a deficiency of petitioner's gift tax liability for the year 1935 in the amount of $2,981.05. Petitioner petitioned the United States Board of Tax Appeals for a redetermination of the deficiency, and by decision entered June 6, 1939, in cause styled *Mary M. Hutchings, petiitoner, vs. Commissioner of Internal Revenue, respondent,* Docket No. 95359, the Board of Tax Appeals, pursuant to its determination as set forth in its report promulgated June 6, 1939, being of the opinion that petitioner was entitled to but one exclusion of $5,000.00 rather than to seven or a total of $35,000.00 as contended by petitioner, ordered and decided that there was a deficiency in petitioner's gift tax liability in the amount of $2,981.05 for the year 1935.

13 3.

That petitioner being aggrieved by the conclusions of law made by the Board of Tax Appeals in its said report and also by said order fixing the deficiency, desires to obtain a review of said report and order by the United States Circuit Court of Appeals for the Fifth Circuit, and as reasons for such review, she alleges that the Board in rendering its opinion and entering said order fixing the deficiency, committed the following errors:

(1) The Board erred in not holding that each of the seven beneficiaries named in the trust indenture was "any person" within the meaning of Sec. 504b of the Revenue Act of 1932.

(2) The Board erred in holding that the trust, as an entity, was the "person" within the meaning of Sec. 504b of the Revenue Act of 1932.

(3) The Board erred in holding that the transfer by petitioner to the Trustees constituted a single gift to the trust, as an entity, entitling petitioner to only one exclusion of $5,000.00.

(4) The Board erred in failing to hold that the transfer by petitioner to the Trustees constituted seven gifts, one to each of the beneficiaries named in the trust instrument, entitling petitioner to an exclusion of $35,000.00.

(5) The Board erred in holding that the trust, as en entity, rather than the beneficiaries, was the donee for the purposes of determining the number of exclusions of $5,000.00 allowable under Sec. 504b of the Revenue
14 Act of 1932.

(6) The Board erred in failing to hold that the seven beneficiaries of the trust indenture, rather than the trust as an entity, were the donees for the purpose of determining the number of exclusions of $5,000.00 allowable under Sec. 504b of the Revenue Act of 1932.

(7) The Board erred in holding that petitioner was entitled to only one exclusion of $5,000.00.

(8) The Board erred in failing to hold that petitioner was entitled to seven exclusions of $5,000.00 each or a total of $35,000.00.

(9) The Board erred in holding that the property was transferred to the trust as an entity.

(10) The Board erred in failing to hold that each beneficiary named in the trust indenture was a donee within the meaning of Sec. 504b of the Revenue Act of 1932, as amended.

Wherefore, petitioner petitions that the said report and decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that transcript of the record be prepared in accordance with law and with the rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

15

Respectfully submitted,
(Signed) BALLINGER MILLS,
Attorney for Petitioner.

The State of Texas,
County of Galveston.

Mary M. Hutchings, being duly sworn, says that she is the petitioner above named; that she has read the foregoing and is familiar with the statements therein contained; and that same are true and correct.

(Signed) MARY M. HUTCHINGS,
Petitioner.

Sworn to and subscribed before me this the 31st day of August, 1939.

(Signed) C. P. WERNER,
Notary Public within and for the County of Galveston, State of Texas.

(Seal)

NOTICE OF FILING PETITION FOR REVIEW.

16

Filed Sep. 12, 1939.

(Title Omitted.)

To the Commissioner of Internal Revenue, Treasury Department, Washington, D. C.:

You are hereby notified that petitioner, Mary M. Hutchings, has filed with the Clerk of the Board of Tax Appeals

at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision and order of the Board heretofore rendered in the above entitled cause. A copy of the petition for review and the assignments of error, as filed, is hereto attached and served upon you.

Dated at Galveston, Texas, this the 31st day of August, 1939.

BALLINGER MILLS,
Attorney for Petitioner, Mary M. Hutchings.

Receipt and service of the above notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this the 6th day of September, 1939.

J. P. WENCHEL,
Attorney for Respondent on Review.

PRAECIPE FOR RECORD.

17 Filed Sep. 23, 1939.

(Title Omitted.)

To B. D. Gamble, Clerk of the United States Board of Tax Appeals, Washington, D. C.:

You are requested to prepare, certify, transmit, and deliver to Mr. Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans within sixty (60) days from September 5, 1939, the date of filing of petition for review, and in accordance with the rules of said Court, for filing, a transcript of the record

in the above styled cause and to include in said transcript of record, copies, duly certified as correct, of the following matters and documents, to-wit:

1. The docket entries of all proceedings before the Board;

2. All pleadings before the Board, including:

(a) Petition for redetermination;

(b) Answer;

3. Findings of fact, opinion, order, and decision of the Board;

4. Petition for review;

18 5. Notice of respondent of filing of petition for review and acknowledgment by respondent of service of notice of filing petition for review, and of a copy of the petition and of assignments of error;

6. This praecipe with acknowledgment of respondent of service thereof.

You are further requested to acknowledge receipt hereof; to advise us of the filing by respondent of acknowledgment of service hereof; and to advise us in ample time to secure order for enlargement if for any reason you are unable to comply with this request.

Dated at Galveston, Texas, this the 16th day of September, 1939.

BALLINGER MILLS,
Attorney for Petitioner, Mary M. Hutchings.
801 Union Station Buliding,
Galveston, Texas.

NOTICE OF FILING OF PRAECIPE FOR RECORD.

19 Received Oct. 2, 1939.

Filed Sep. 26, 1939.

(Title Omitted.)

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that petitioner, Mary M. Hutchings, has filed with the Clerk of the Board of Tax Appeals at Washington, D. C., a praecipe for record, requesting the Clerk to prepare, certify, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans for filing a transcript of the record in the above styled cause. A copy of the praecipe for record, as filed, is hereto attached and served upon you.

Dated at Galveston, Texas, this the 16th day of September, 1939.

BALLINGER MILLS,
Attorney for Petitioner, Mary M. Hutchings,
801 Union Station Building,
Galveston, Texas.

Receipt and service of the above notice together with a copy of the praecipe for record mentioned therein is hereby acknowledged this the 26th day of September, 1939.

(s) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

20 CERTIFICATE.

(Title Omitted.)

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 19, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 10th day of October, 1939.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(Seal)

That thereafter the following proceedings were had in said cause
n the United States Circuit Court of Appeals for the Fifth Circuit,
iz:

Argument and submission

Extract from the Minutes of March 13, 1940

No. 9319

MARY M. HUTCHINGS

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by Rupert R. Harkrider, Esq., and Thomas W. Lain, Esq., for petitioner, and Miss Louise Foster, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

n the United States Circuit Court of Appeals for the Fifth Circuit

No. 9319

MARY M. HUTCHINGS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals (District of Texas)

April 13, 1940

Before SIBLEY, HUTCHESON, and HOLMES, Circuit Judges

HUTCHESON, Circuit Judge: Petitioner, having a donative intent toward her seven children, transferred to two of them in trust for the seven, property valued at $144,970.34. The Commissioner allowed a specific exemption of $50,000, and on the theory that the donation was one, to the trustees and not seven, one to each of the beneficiaries, allowed the donor one $5,000 exemption instead of the seven she claimed. The Board sustained the Commissioner's determination. Petitioner's appeal presents the single question whether, for the purpose of the $5,000 gift tax exclusion, allowed under Section 504B, Revenue Act of 1932, the gifts in trust should be treated as seven gifts; that is to each of the beneficiaries his proportionate part of the whole fund, or one gift, the whole of the fund to the trustees.

Petitioner is in the extremely fortunate position of being able to point out that every Circuit Court of Appeals and every District Court which has passed on the question,[1] has held that the objects of the donative intent in such cases and therefore the recipients of the gifts, are the beneficiaries, not the trustees, who are the mere instruments for carrying out the intent, and that the Board itself has in later cases, taken this same view.[2] She invites us to join the procession and to make it, except for respondent, unanimous. Respondent, standing his ground though deserted and alone, insists that all of the cited rulings and decisions are wrong, and appealing to our pride of opinion, invokes our independent judgment. We have examined and considered the question, both independently and in the light of the reasons advanced for and against respondent's determination and the Board's approval of it. We think it plain that wrongly based on the supposed but not the real purport and effect of Commissioner v. Wells, 88 Fed. (2d) 339; Commissioner v. Krebs, 90 Fed. (2d) 880, the conclusion of the Commissioner and the Board finds support neither in the language of the statute nor in the decisions the Board relies on.

Whatever of confusion and of apprehension as to its opening a loophole for gift-tax evasions, has arisen from a misconstruction of the effect of the holding in the Wells case, has been dissipated by the decisions cited in Note 1 and by Section 505 of the Revenue Act of 1938, which as to transfers in trust, takes away the exclusion entirely.

While not directly in point, these cases correctly construed, in effect support the view of petitioner that the gift is not to the trustees, but a present one to the beneficiaries, whether accomplished by the creation of one or more trusts. The case for petitioner's view is well and strongly put in Welch v. Davidson and in Rheinstrom v. Commissioner, supra. We can add nothing. The decision of the Board is reversed and the cause is remanded for a determination of the deficiency in accordance herewith.

Reversed and remanded.

SIBLEY, Circuit Judge, Concurring: I do not think the question is so onesided as it is made to appear. The Revenue Act of 1932, Sec. 554 (b), excluded from tax the first $5,000 "in the case of gifts (other than future interests in property) made to any person by the donor during the calendar year.". By Section 1111 (a) "The term 'person' means an individual, a trust or estate, a partnership, or a corporation." This definition was cited and applied in Commissioner vs. Wells, 88 Fed. (2d) 339, and Commissioner vs. Krebs, 90 Fed. (2d) 880, the trusts therein being treated as the donees of the gifts. However, most of the discussion was about the question of "future interests in property," and the holding on that was that what the donor presently parted with

[1] Davidson v. Welch, 22 Fed. Supp. 726; McBrier v. Commr., 108 Fed. (2d) 967; Rheinstrom v. Commr., 105 Fed. (2d) 642; Robertson v. Nee, 105 Fed. (2d) 651; Ryerson v. U. S., 28 Fed. Supp. 265; Welch v. Davidson, 102 Fed. (2d) 100.

[2] Rubinstein v. Commr., 41 B. T. A. —, No. 34. (B. T. A.); Winterbotham v. Commr., — B. T. A. —, decided Feb. 7, 1940.

and not what some beneficiary might presently receive was determinative. Welch vs. Davidson, 102 Fed. (2d) 100, rejected the idea that the trust was the donee, and by confusing the trust with the trustee (who of course takes title only and no beneficial interest), asserted that the beneficiaries are always the donees. Reliance was put on Burnett vs. Guggenheim, 288 U. S. 280, which decided nothing about whether the trust or the beneficiary was the "person" to whom a gift in trust is given, but decided only that the gift is not complete until the power to revoke it is extinguished. Rheinstrom vs. Commissioner, 105 Fed. (2d) 642; Robertson vs. Nee, 105 Fed. (2) 651; McBrier vs. Commissioner, 108 Fed. (2d) 967, follow the Welch case. The dictum of these latter cases that "in equity the beneficiary of a trust is the owner of the trust res" is not always true, as in the case of charitable trusts. Equity does not hold the trustee to be the full owner, because his title is incumbered with the trust, but often and for long periods the beneficiaries may be unknown or unascertainable, or some enterprise or cause is to be benefited rather than certain individuals. And if Congress really intended "the trust" to be regarded as the "person" who receives a gift, the attitude of equity would be immaterial. The amendment of Sect. 504 (b) by the Act of May 28, 1938, 52 Stat. 553, which excludes "gifts in trust" as well as "of future interests in property" from the $5,000 exemption, shows only that Congress thought best to avoid rather than settle the question whether the trusts or the individual beneficiaries should be counted in ascertaining the number of gifts.

While from an administrative standpoint it is regrettable to introduce a question of the donor's intention as controlling, I think we must. If it appears that some enterprise or charity or impersonal purpose, or even remote and unascertained first beneficiaries, furnished the motive for the gift in trust, it should be esteemed a single gift to the trust. If on the other hand the first beneficaries are ascertained individuals whom the donor wished to help, and used the trust only as a device to convey or preserve the gift or control its ultimate devolution, the gift is to these persons, and not to the trust, and there are as many gifts as there are first beneficiaries. In the case first put the gift is moved by a general benevolent purpose, and resembles a gift to a corporation, which would be but a single gift no matter who might be or become stockholders. In the second case the gift is moved by personal affection, intended to benefit special individuals who might have been made separate donees.

In the case before us the gift in trust was plainly not moved by any general idea or ideal, but by personal affection to her seven children. She might easily have created a trust for each in a seventh of the property. Her intention was to give each an equal share, with the safeguards afforded by the trust management. Without doubt her intention was to make a gift to each of her children, the trust being only the machinery to accomplish it.

(40 B. T. A. 27.)

Judgment

Extract from the Minutes of April 13th, 1940

No. 9319

MARY M. HUTCHINGS

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Mary M. Hutchings for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decision of the said United States Board of Tax Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said United States Board of Tax Appeals for a determination of the deficiency in accordance with the opinion of this Court.

"Sibley, Circuit Judge, Concurring."

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 21 to 27, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9319, wherein Mary M. Hutchings is petitioner, and Commissioner of Internal Revenue is respondent, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 20, are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 19th day of August, A. D. 1940.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit,
By (Sgd.) E. WENDLING,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1940

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY M. HUTCHINS

MOTION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States:

Your petitioner, the Commissioner of Internal Revenue, respectfully presents this application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled cause, and in support thereof, presents the following:

STATEMENT

This proceeding was instituted in the Board of Tax Appeals to review a deficiency determined by the Commissioner of Internal Revenue. The respondent, during 1935, transferred property valued at $144,970.34 in trust for her seven children. The Commissioner, on the theory that the gift was to the trustees and not to the beneficiaries, allowed only one exemption of $5,000 instead of the seven exemptions of $5,000 each claimed by respondent. The Board sustained the Commissioner's determination. The Circuit Court of Appeals for the Fifth Circuit has reversed the Board's decision and held that the number of exemptions is determined by the number of beneficiaries to the trust.

REASON FOR EXTENSION OF TIME

A similar question on a comparable state of facts was presented to the Circuit Court of Appeals for the Seventh Circuit on May 16, 1940, in *United States* v. *Ryerson*, No. 7133, in which a decision has not yet been rendered.

It is petitioner's judgment that he should not burden this Court with a petition for a writ of certiorari unless there is a conflict of decisions between the Circuit Courts of Appeals. It is probable that a decision will be rendered in the *Ryerson* case within the next sixty days. Therefore, it is respectfully requested that an extension of sixty days from July 13, 1940, be granted for filing a petition for a writ of certiorari in the above-entitled case.

FRANCIS BIDDLE,
Solicitor General.

JULY —, 1940.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

MARY M. HUTCHINS

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR A WRIT OF CERTIORARI

On consideration of the motion of counsel for the petitioner in the above-entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be and the same is hereby extended for a period of sixty days from July 13, 1940.

Dated this 9th day of July 1940.

(Sgd.) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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Supreme Court of the United States

Order allowing certiorari

Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for hearing immediately following No. 393.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK

No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY M. HUTCHINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY M. HUTCHINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 13, 1940.

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 8–12) is reported at 40 B. T. A. 27. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 21) is reported at 111 F. (2d) 229.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered April 13, 1940[1] (R. 24). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the donor of a gift in trust is entitled under the provisions of Section 504 (b) of the Revenue Act of 1932 to one $5,000 exclusion for the entire trust or to a separate $5,000 exclusion for each of the beneficiaries of the trust.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply

[1] On July 9, 1940, an order was signed by Justice Black extending the time within which to apply for a writ of certiorari to September 11, 1940.

to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

[U. S. C., Title 26, Sec. 550.]

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year. [U. S. C., Title 26, Sec. 553.]

SEC. 1111 DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

[U. S. C., Title 26, Sec. 1696.]

STATEMENT

The findings of the Board of Tax Appeals may be summarized as follows (R. 9-10):

On December 30, 1935, taxpayer executed an indenture of trust which recited that she desired to convey, assign, transfer, and deliver to trustees cer-

tain real estate, personal property, and securities for the purpose of creating a voluntary living trust. The property conveyed was "all of the Grantor's right, title, interest and estate" in the described personal and real properties of a value of $144,970.34. (R. 9.)

The trustees were to hold the property in trust for the use and benefit of the taxpayer's seven children, and in their sole and absolute discretion could hold and accumulate the entire net income, interest, rents, profits, and revenues of the trust corpus, or distribute the same according to the respective interests of the beneficiaries, who were to share and share alike in all distributions and payments of either principal or income. In the event of the death of a beneficiary prior to the termination of the trust, his or her interest was to go to the person or persons designated in the will of the deceased beneficiary, and in default of appointment his or her interest in the trust estate vested in the deceased beneficiary's heirs at law as determined by the law of descent and distribution of Texas. (R. 9–10.)

Paragraph six of the trust agreement provides (R. 10):

> Neither the principal nor the income of the trust shall ever be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure by any creditor of any such beneficiary under any writ or proceeding at law or in equity, and no such

> beneficiary shall have power to sell, assign, transfer, convey, encumber, or in any other manner dispose of or anticipate the disposition of his or her interest in the trust property, or the income to be produced thereby, or any divisions or distributions thereof.

The trust was to terminate March 1, 1957, unless sooner terminated by final division and distribution of the trust property. Upon termination of the trust any and all property was to be paid over and delivered to the then beneficiaries according to their respective interests. The trust instrument provided that the grantor should have no power to revoke the trust nor to revest in herself any part of the principal or income thereof.

In arriving at the gift tax deficiency asserted in this cause the Commissioner allowed a specific exemption of $50,000 and one exclusion of $5,000. (R. 6–7.) His action was approved by the Board of Tax Appeals. The Circuit Court of Appeals in its opinion dated April 13, 1940, reversed the decision of the Board, and held that the taxpayer was entitled to a $5,000 exclusion for each of the seven beneficiaries of the trust.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that under Section 504 (b) of the Revenue Act of 1932 taxpayer was entitled to an exclusion of $5,000 for each beneficiary of the trust

in the computation of the net amount of the gift in trust subject to tax.

REASON FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals for the Fifth Circuit that the beneficiaries and not the trust are the donees and that therefore a $5,000 exclusion is available for each beneficiary is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Ryerson,* decided July 9, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, par. 9576. The same question is presented in *Pelzer* v. *United States,* 31 F. Supp. 770 (C. Cls.), in which a petition for a writ of certiorari was recently filed by the Government, No. 393, present Term.

Wherefore, it is respectfully submitted that, if certiorari is granted in the *Pelzer* case, it should likewise be granted here.

FRANCIS BIDDLE,
Solicitor General.

SEPTEMBER 1940.

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No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY M. HUTCHESON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 419

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY M. HUTCHINGS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–12) is reported at 40 B. T. A. 27. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 21–23) is reported at 111 F. (2d) 229.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered April 13, 1940 (R. 24). On July 9, 1940, an order was signed by

a Justice of this Court extending to September 11, 1940, the time within which to apply for a writ of certiorari (R. 27). The petition for a writ of certiorari was filed September 11, 1940, and was granted October 28, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under Section 504 (b) of the Revenue Act of 1932 the donor of a gift in trust is entitled to one $5,000 exclusion for the entire trust or to a separate $5,000 exclusion for each of the beneficiaries of the trust.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Acts of 1932 and 1938 and of the Treasury regulations promulgated thereunder are set out in the Appendix to the brief for the United States in *United States* v. *Pelzer,* No. 393, this Term, to be argued herewith.

STATEMENT

The findings of the Board of Tax Appeals are in substance as follows (R. 9–10):

On December 30, 1935, the taxpayer executed an indenture of trust and transferred to the trustees personal and real properties of a value of $144,970.34. The trust instrument provided that the trustees were to hold the property in trust for the use and benefit of the taxpayer's seven children.

In their discretion the trustees could hold and accumulate the entire net income of the trust corpus, or distribute it among the beneficiaries, who were to share and share alike in all distributions and payments of either principal or income. In the event of the death of a beneficiary prior to the termination of the trust, his or her interest was to go to the person or persons designated in the will of the deceased beneficiary, and in default of appointment to the deceased beneficiary's heirs at law as determined by the law of Texas (R. 9–10).

Paragraph six of the trust agreement provides (R. 10):

> Neither the principal nor the income of the trust shall ever be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure by any creditor of any such beneficiary under any writ or proceeding at law or in equity, and no such beneficiary shall have power to sell, assign, transfer, convey, encumber, or in any other manner dispose of or anticipate the disposition of his or her interest in the trust property, or the income to be produced thereby, or any divisions or distributions thereof.

The trust was to terminate March 1, 1957, unless sooner terminated by final division and distribution of the trust property. Upon termination of the trust the corpus was to be paid over to the then beneficiaries according to their respective interests. The trust instrument provided that the grantor (the taxpayer) should have no power to revoke the

trust nor to revest in herself any part of the principal or income. (R. 10.)

In auditing the taxpayer's return for 1935 the Commissioner allowed a specific exemption of $50,000 and one exclusion of $5,000, in lieu of seven $5,000 exclusions claimed by the taxpayer (R. 6). The Commissioner explained that—"Inasmuch as the trust to which the gifts were made is considered to be one donee, only one exclusion therefor may be allowed" (R. 7). On this issue the Commissioner proposed a gift tax deficiency of $2,981.05. The Board of Tax Appeals approved the determination of the Commissioner. The Circuit Court of Appeals for the Fifth Circuit reversed, holding that the taxpayer was entitled to a separate $5,000 exclusion for each of the seven beneficiaries of the trust (R. 21–24).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

In holding that under Section 504 (b) of the Revenue Act of 1932 the taxpayer was entitled to an exclusion of $5,000 for each beneficiary of the trust in the computation of the net amount of the gift in trust subject to tax.

ARGUMENT

The question presented in this case is the same as the first of the two questions presented in *United States* v. *Arthur Pelzer,* No. 393, this Term, to be argued herewith. Hence we adopt for this case

the brief on behalf of the United States in the *Pelzer* case.

In addition to what is said in the *Pelzer* brief, we believe that the trust instrument in this case illustrates the advisability of considering the trust as the donee. As pointed out in the *Pelzer* brief, the donees are secondarily liable for the gift tax to the extent of the value of the property received by them. Here, under paragraph 6 of the trust instrument, *supra*, p. 3, neither the principal nor the income of the trust may be liable for the debts of the beneficiaries, and none of the beneficiaries has any power to sell, assign, or encumber his or her interests in the trust property or income. Hence it would be desirable to hold the trust, rather than the beneficiaries, liable for the tax.

CONCLUSION

For the reasons stated in the brief for the United States in the *Pelzer* case, it is submitted that the decision of the court below is erroneous and that it should be reversed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
THOMAS E. HARRIS,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

DECEMBER 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 419.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

MARY M. HUTCHINGS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

T. W. LAIN
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Galveston, Texas
Attorneys for Respondent

KNAPP BROS., STATIONERS & PRINT., GALV

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 419.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

MARY M. HUTCHINGS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 8-12) is reported at 40 B. T. A. 27. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 21) is reported at 111 Fed. (2d) 229.

STATEMENT OF THE CASE.

The case arises on a writ of certiorari issued, upon application of Petitioner, to review the judgment of the Circuit Court of Appeals for the Fifth Circuit.

On December 30, 1935, pursuant to a written agreement, Respondent transferred real and personal property to trustees to hold in trust for the use and benefit of her seven children who were to share equally in all distributions and payments of either principal or income. (R. 9.)

Respondent, in filing her gift tax return, claimed an exclusion of $5000 for each of her seven children under the provisions of Sec. 504(b) of the Revenue Act of 1932. (R. 3.) Petitioner's position is that Respondent is entitled to only one $5000 exemption instead of the seven claimed. The Circuit Court of Appeals for the Fifth Circuit following a line, unbroken at the time, of decisions of other Courts held for Respondent. To review the correctness of that decision, writ of certiorari has been granted in this case upon Petitioner's application.

QUESTION INVOLVED.

Whether the transfer of property to trustees in trust for the use and benefit of seven living, individual beneficiaries constitutes, for the purpose of determining the number of exclusions properly allowable under Section 504b of the Gift Tax Act of 1932, seven gifts to the beneficiaries or one gift to the trust as an entity.

STATUTE INVOLVED.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(U. S. C., Title 26, Sec. 550.)

Sec. 504, NET GIFTS.

(a) **General Definition.**—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) **Gifts Less Than $5,000.**—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

(U. S. C., Title 26, Sec. 553.)

Sec. 1111. DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(U. S. C., Title 26, Sec. 1696.)

SUMMARY OF THE ARGUMENT.

POINT I.

Each beneficiary named in the trust and not the trust is a "person" within the meaning of Sec. 504(b) of the Revenue Act of 1932.

POINT II.

The tax is levied upon transfers of property by gift. The gifts were made to the beneficiaries and not to the trust.

POINT III.

The tax in question is imposed upon the transfer of property by gift. Sec. 504(b) of the Revenue Act of 1932 provides in the case of gifts made to any person by the donor, the first $5000 of such gifts to such person shall not be included. The transfer of property by Respondent in trust for the use and benefit of her seven children constituted seven gifts by her as donor, one to each child. The first $5000 of each of such gifts is properly excluded in determining the total amount of gifts subject to the tax under Sec. 504(b) of the Revenue Act of 1932.

POINT IV.

The decisions of the Court below, of five other Circuit Courts, of the Court of Claims, and the present position of the Board of Tax Appeals are correct interpretations of the law. The single Circuit Court decision to the contrary does not correctly construe the statute.

ARGUMENT.

POINT I.

Each beneficiary named in the trust and not the trust is a "person" within the meaning of Sec. 504(b) of the Revenue Act of 1932.

Sec. 504(b) of the Revenue Act of 1932 in part provides:

> "In the case of gifts . . . made to any person by the donor . . . the first $5000 of such gifts to such person shall not . . . be included in the total amount of gifts . . . ."

The word "person" used therein certainly includes the seven living individuals named as beneficiaries of the trust. The gifts were made to the donor's seven children and they were the "persons" within the meaning of Sec. 504(b) properly construed rather than the trust. **Welch vs. Davidson,** 102 Fed. (2) 100. Under the logical and proper interpretation of Sec. 504(b) Respondent made a gift to each of her seven children rather than one gift to the trust.

POINT II.

The tax is levied upon transfers of property by gift. The gifts were made to the beneficiaries and not to the trust.

POINT III.

The tax in question is imposed upon the transfer of property by gift. Sec. 504(b) of the Revenue Act of 1932 provides in the case of gifts made to any person by the

donor, the first $5000 of such gifts to such person shall not be included. The transfer of property by Respondent in trust for the use and benefit of her seven children constituted seven gifts by her as donor, one to each child. The first $5000 of each of such gifts is properly excluded in determining the total amount of gifts subject to the tax under Sec. 504(b) of the Revenue Act of 1932.

Petitioner contends that as Sec. 1111 of the Act defines the term "person" when used in the Act to mean "an individual, a trust or estate, a partnership, or a corporation," the trust was the "person" under Sec. 504(b). But this definition is broad enough to include both the individuals and the trust. The real question is whether Respondent's seven children named in the trust indenture as beneficiaries are the "persons" to whom the gifts were made, as held by the Court below, or whether, as petitioner contends, the gifts were made to the trust.

The Act was aimed at gifts. **Welch vs. Davidson,** 102 Fed. (2) 100. And the gifts were not to the trust or trustees but to the children named as beneficiaries. **Rheinstrom vs. Comm'r,** 105 Fed. (2) 642. The trustees held the legal title only and received no economic benefits without consideration. They certainly were not the object of the donor's bounty or donative intent. The beneficiaries, and not the trust, were entitled to all of the income and corpus of the trust, except the expenses and fees of administration. The donor's intention was to make a gift to each of her seven children and the trust was the means selected to accomplish her purpose. She neither gave the trust anything nor had the intent to do so. As a matter of substance, rather than form, the gifts were not to the trust but to the beneficiaries. **Hutchings vs. Comm'r.**

111 Fed. (2) 229; **Welch vs. Davidson**, 102 Fed. (2) 100; **Rheinstrom vs. Comm'r.**, 105 Fed. (2) 642; **Robertson vs. Nee**, 105 Fed. (2) 651; **McBrier vs. Comm'r.**, 108 Fed. (2) 967.

POINT IV.

The decisions of the Court below, of five other Circuit Courts, of the Court of Claims, and the present position of the Board of Tax Appeals are correct interpretations of the law. The single Circuit Court decision to the contrary does not correctly construe the statute.

The District Courts, the Court of Claims, the Circuit Courts of Appeals, with one exception, and the Board of Tax Appeals, have held under similar facts that the gifts are to the beneficiaries and not to the trusts and that an exclusion of $5000 is proper for each beneficiary. **Early vs. Reid**, 112 Fed. (2) 718 (C.C.A. 4th); **Pelzer vs. U. S.**, 31 Fed. Supp. 770 (Ct. Cls.); **Welch vs. Davidson**, 102 Fed. (2) 100 (C.C.A. 1st); **Rheinstrom vs. Comm'r.**, 105 Fed. (2) 642 (C.C.A. 8th); **Robertson vs. Nee**, 105 Fed. (2) 651 (C.C.A. 8th); **McBrier vs. Comm'r**, 108 Fed. (2) 967 (C.C.A. 3rd). The opinion in **U. S. vs. Ryerson**, 114 Fed. (2) 150 (C.C.A. 7th) does not mention or discuss the cases to the contrary and writ of certiorari has been granted in that case.

CONCLUSION.

Under a proper interpretation of Section 504b, Respondent made gifts to each of her seven children rather than one gift to the trust. Substance rather than form should control. The judgment of the Court below is correct and should be affirmed.

Respectfully submitted,

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December 28, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 419.

GUY T. HELVING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

MARY M. HUTCHINGS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

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SUPPLEMENTAL BRIEF FOR RESPONDENT.

By leave of the Court, the Respondent respectfully requests permission to file this its Supplemental Brief. This request is made due to the fact that Petitioner's Brief was not received by Respondent until the afternoon of January 1st, which was subsequent to the time Petitioner's Brief was filed.

SUMMARY OF ARGUMENT.

POINT I.

The tax is not imposed upon the receipt of the property by the Donee but is an excise tax upon the act of the Donor in making a transfer of the property.

POINT II.

The "Apprehended Difficulty" of determining the number of Donees and the amount they received is not present in this case.

ARGUMENT.

POINT I.

The tax is not imposed upon the receipt of the property by the Donee but is an excise tax upon the act of the Donor in making a transfer of the property.

The gist of the Petitioner's argument in the case of **United States vs. Pelzer**, No. 393, this term, which the Petitioner adopts as argument in this case, appears to be based entirely upon the theory that instead of the tax here in question being a tax measured by the value of the gift made by the Donor, it should be determined by the amount of property received by the Donee. Article 3, Regulations 79, 1936 Edition, relating to Gift Tax under the Revenue Act of 1932, is quoted in part as follows:

> "The tax is not imposed upon the receipt of the property by the Donee nor is it necessarily determined by the measure of enrichment resulting to the Donee from the transfer, nor is it conditioned upon ability to identify the Donee at the time of the transfer. On the contrary, the tax is a primary

and personal liability of the Donor, is an excise upon his act of making the transfer, **is measured by the value of the property passing from the Donor** and attaches regardless of the fact that the identity of the Donee may not then be known or ascertainable." (Emphasis supplied.)

In fact this is the identical position at one time urged by the Government. In **U. S. vs. Ryerson, et al Excrs.,** 114 Fed (2nd) 150, certiorari granted No. 495, this term the Court quoted in part from the brief of the United States as follows:

> "Under the undisputed evidence all the elements of a consummated gift were present. With respect to the donor the transfer was not **in futuro.** He thereby devised himself of all vestige of title, and no future act on his part could modify or abrogate his act. Likewise, the donees were competent to accept the gifts and they did so immeditaely. True, they were trusts, but they were no different from persons, for the Act so states. They took immediate title to and possession of all the property from the donor; they put it to instant use for the directed purpose of building up an estate for the ultimate and contingent beneficiaries, who were named specifically. The fact that those beneficiaries did not come into possession of the corpus until some time in the future, dependent upon some contingency, does not make the donor's act any the less a completed transfer to the trustees. **The fact must not be overlooked that the Act involved relates to transfers and not receipts.**"

That, according to the Court, was quoted by the United States in its brief. The exxact contrary on practically all points is now being argued by the United States in the case of **U. S. vs. Pelzer,** No. 393, this term.

The Petitioner has shifted his position so many times

as pointed out on page 14 to 17 of his brief, that it is most difficult for a taxpayer to know at any one time the position the Petitioner is taking for that moment. On page 11 of the Petitioner's brief in the Pelzer case the Petitioner makes the statement that the trust receives a present interes. This is diametrically opposed to the position taken in the case of **Charles W. Deeds vs. Commissioner**, 37 B. T. A. 293. Quoting from the Board's opinion in part:

> "The Respondent (Commissioner of Internal Revenue) claims first that the beneficiaries of the trust did not take present interest because, he argues, that possession and enjoyment of the property are postponed until a future date. This conclusion is based upon the fact that neither the property conveyed to the trust nor the income from it was as a matter of right immediately subject to the unqualified demands of the beneficiaries but rather until the beneficiaries reached the age of 30. Any distribution out of the income or principal was subect to the sole discretion of the trustee. The Respondent next claims that the transfer cannot be regarded as gifts of present interest to the trust as an entity since the trustee acquired no beneficial inerest and the gifts were not to him but to the children. He cites **Burnett vs. Guggenheim,** 288 U. S. 280, for the proposition that the Gift Tax statute is not aimed at every transfer of legal title without consideration but only at transfers that have the quality of a gift. He concludes that it is necessary to consider the equitable rather than the legal interest transferred to determine whether there was a gift of a future interest in property."

Referring again to the number of times that the Petitioner has shifted his position it may be pointed out that the Treasury Department (see Pelzer brief, page

11) in administering the gift tax proceeded for some years on the assumption that under Section 504(b) the beneficiaries of a gift in trust were considered the donees. The second position was, after several years, that while the beneficiaries were the donees, yet they took only future interests. **Deeds vs. Commissioner,** 37 B. T. A. 293. The third position taken was that the beneficiaries were not in fact the donees at all, but that the trusts or the trustees were the donees.

This last position resulted in a boomerang to the Commissioner for it clearly pointed the way to tax avoidance, and as stated in **McBrier vs. Commissioner** 108 F. (2nd) 967 was "viewed with Congressional alarm." The Court referred to the Senate Committee on Finance report for 1938 as follows:

> "The Board of Tax Appeals and several of the Federal Courts have held, with respect to gifts in trust, that the trust entities were the donees and on that account the gifts were of present and not of future interests. The statute as thus construed, affords ready means of tax avoidance, since a donor may create any number of trusts in the same year in favor of the same beneficiary with a $5,000.00 exclusion applying to each trust, whereas the gifts, if made otherwise than in trust, would in no case be subject to more than a single exclusion of $5,000.00. 75th Cong., 3d Sess. S. Rep. No. 1467, p. 41."

On page 29 of the Pelzer brief the Petitioner expresses wonder at the inconsistency of the taxpayer in that case. After reviewing the Petitioner's various positions heretofore assumed, one is inclined to agree that consistency is indeed the rarest of jewels.

It is respectfully submitted that position first taken by the Commissioner that the beneficiaries of the trust

are in fact the real donees, is the correct position.

POINT II.

The "Apprehended Difficulty" of determining the number of Donees and the amount they received is not present in this case.

The Petitioner devotes a great deal of space in his brief in the Pelzer case to what he terms the "apprehended difficulty" in determining the number and identity of the beneficiaries and the nature and value of each gift.

The Petitioner argues on page 21 of that brief that "The position that the trust should be considered as the 'person' or donee for the purpose of determining the number of exclusions is also the more practicable rule administratively since it avoids the necessity of determining the number and identity of the beneficiaries and the nature or value of their separate interest in each gift."

In this connection it may be stated that in the great majority of instances there is no difficulty in determining either fact. At least that is true in the instant case.

It may be further pointed out that the Commissioner of Internal Revenue has vast administrative powers and in all cases where it is difficult to obtain the facts in any given case, this difficulty is usually to the detriment of the taxpayer who must in each instance prove his case and relieve himself of the difficulties encountered.

It is sometimes administratively difficult to determine whether or not a bad debt is entirely worthless under the income tax statutes. It would be just as logical to attempt to invoke the aid of this Court in repeal-

ing the statute that permits a deduction for a bad debt as to appeal for a construction of the gift tax statutes that would relieve the "apprehended difficulty" of determining some given facts in some isolated cases.

It may also be stated that it is the duty of Congress to pass the administrative statutes, and if those statutes are not sufficient for the Petitioner to expediently administer the laws, then such laws should be changed by Congress, and the Petitioner should not seek to invoke the aid of the courts to legislate.

It is again stated that there is no difficulty in determining the facts in the instant case. In this case there are **seven named living beneficiaries.** (R. 9.) The value of the gift made by the donor is not in dispute, the same being $144,970.34. The beneficiaries all share and share alike. It is but a matter of simple arithmetic to determine that each **named** beneficiary, whose identity is definitely ascertainable, actually received a gift of a value in excess of $5,000.00. Otherwise there would be no tax. This notwithstanding the provision of Article 3 of Regulations 79, which states that the tax is not necessarily determined by the measure of enrichment resulting to the Donee from the transfer. Nor can it be said that the possession and enjoyment of the gift is postponed. All title and interest in the property went out of the grantor at the time of the gifts. It is upon this act of making the transfer that the excise is laid. This is the very root of the tax.

In the case of Thomas E. Wells 34 B. T. A. 315, it was there held that although **possession** of the trust property was postponed there was present **enjoyment** thereof by the beneficiaries inasmuch as it was being

administered and the income was being accumulated for their sole use and benefit. This conclusion was reached even though as in the present case the trust property was not immeditaely subject to the unqualified demands of the beneficiaries as a matter of right. This case can be said to be an even stronger case for here the beneficiaries are entitled to **all** of the income distributed by the trustees and are entitled to **all** distributions of the principal made by the trustees. They have the power of appointment under their will which is a valuable right so that even the mere exercise thereof would be a taxtable item in the estate of the deceased benficiaris. Even if one of them should die without having exercised this power of appointment the property, by the very terms of the trust vests in the heirs at law of the deceased beneficiary. If the income is not distributed it is **held** for their **use and benefit.** They alone acquired the beneficial interest. Throughout the duration of the trust the beneficiary has the sole beneficial interest which began immediately upon the creation of the trust without any beneficial interest intervening. Since this interest of the beneficiary began immediately upon the conveyance to the trust the beneficiary took a present interest in the property conveyed.

The Petitioner points out the clause in the trust instrument which is a restraint upon alienation by the beneficiaries. This clause commonly seen in trusts is known as the "spendthrift clause." The Petitioner expresses alarm over the fact that with this clause therein he may not be able to collect the tax. The Petitioner well knows that the tax is primarily an obligation of the Donor. The Donee is only secondarily liable in case the Donor either fails to pay the tax or is unable to do so.

It is true that situation could arise whereby a Donor would divest himself entirely of all of his property and thereby be wholly unable to pay the tax. The Petitioner has many remedies, however, in case the Donor cannot or will not pay the tax. Section 510 of the Revenue Act of 1932 imposes a lien upon all gifts for a period of ten years from the time the gifts are made. This lien is upon the **property.** With the Commissioner's power to restrain upon bank accounts and to levy upon property it is extremely doubtful if there has ever been any instance heretofore where the Commissioner has been unable to collect the full amount of the gift tax, at least there is nothing in the record to show that he did not. Furthermore, this so-called "spendthrift clause" or any other clause that may be written into any instrument could not prevent the collection of any tax, just and due, and of this the Petitioner well knows, yet the Petitioner in effect is asking this Court to hold in this case that the trust should be the Donee for the reason that this paragraph is included in the trust instrument. The mere fact that the holding in this case may affect many other cases appears to be of no moment to the Petitioner. In passing it may be said that it is quite apparent that this clause was not included in the trust instrument to prevent the Commissioner of Internal Revenue from collecting all tax that was just and due but was inserted therein as a protection to the beneficiaries and to the trust property against attempted assignments of the principal or income, and against judgment creditors.

If it should be held that the tax is measured by what the **Donee receives** and not what the **Donor gives,** then it would be necessary to impose the tax upon the Donee and not upon the Donor and it would be necessary to

postpone the tax until the property became subect to the Donees unqualified demands. The Petitioner's "Apprehended Difficulties" in administrative procedure would increase a thousandfold if, as the Petitioner here impliedly asserts, the value of what the **Donee receives** should be the basis of the tax. Then the difficulty of collecting from the Donee would be a complete change of both the law and the administrative procedure. This would be so entirely out of harmony with the Gift Tax Act itself that it would result in utter discord of the whole concept of the Gift Tax law as written by Congress. The Petitioner's troubles would multiply many times on account of the new angles that would be given to the new theory and the new concept in the gift tax, which would not in fact be a **gift tax** but on the other hand a **recipient taxx.** In order for the law to be in complete harmony it must be upon the basis that the tax is **upon the Donor and is not imposed upon the receipt of the property by the Donee, nor is it necessarily determined by the measure of enrichment resulting to the Donee from the transfer.**

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 419.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Mary M. Hutchings.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 3, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The petition for certiorari presents the single question whether under § 504(b) of the Revenue Act of 1932, 47 Stat. 169, 247, the donor of property in trust for the benefit of numerous beneficiaries is entitled to a single gift tax exemption or exclusion to the extent of the first $5,000 or to separate exemptions of $5,000 for each beneficiary.

Sections 501(a), 502(1) impose for each calendar year a tax on the net amount of the transfers "by any individual . . . of property by gift". By § 501(b) the tax applies "whether the transfer is in trust or otherwise" and "whether the gift is direct or indirect". In the computation of the tax laid upon "net gifts" made during the calendar year, § 504(b) provides "In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year the first $5,000 of such gifts . . . shall not . . . be included in the total amount of gifts made during such year". And § 1111, defining generally terms used throughout the Revenue Act, provides: "(a) When used in this Act—(1) The term 'person' means an individual, a trust or estate, a partnership, or a corporation."

On December 30, 1935, the taxpayer executed a trust indenture by which she transferred, in trust, property of a value of approximately $145,000 for a term ending in 1957, unless sooner terminated by the trustees, for the benefit of her seven children, with gifts over of the share of each child in event of the death of that child before the expiration of the trust. The taxpayer in her gift tax return for 1935 excluded from the taxable amount of her gifts the sum of $5,000 for each child or a total of $35,000. The commissioner allowed only a single deduction of $5,000 in lieu of the seven

$5,000 deductions claimed by the taxpayer and assessed a deficiency accordingly. The Board of Tax Appeals, treating the trust as the donee rather than the individual beneficiaries, sustained the commissioner's assessment. The Court of Appeals for the Fifth Circuit reversed. 111 F. (2d) 229. We granted certiorari October 28, 1940, to resolve a conflict of the decision below and of like decisions in other circuits. *Welch* v. *Davidson,* 102 F. (2d) 100 (first circuit); *Rheinstrom* v. *Commissioner,* 105 F. (2d) 642 (eighth circuit); *McBrier* v. *Commissioner,* 108 F. (2d) 967 (third circuit), and in the Court of Claims, *Pelzer* v. *United States,* 31 Fed. Supp. 770, with that of the Seventh Circuit in *Ryerson* v. *United States,* 114 F. (2d) 150.

It is not doubted that separate gifts, other than of future interests, made directly to the donees without the intervention of a trustee entitle the donor under § 504(b), to one $5,000 exclusion for each gift. But the Government argues that here the trustee or the trust is the donee and as there was only a single trust there can be only a single statutory deduction from the total amount of the gifts. As the statute allows one deduction of the first $5,000 for each gift "made to any person" by the donor, the question for decision is whether in this case of a gift in trust for the benefit of the designated beneficiaries the single trust, or each beneficiary, is the "person" to whom the gift was made and for which the deduction is allowed.

The statutory definition of "person" in § 1111(a)(1) is of little aid in answering this question. The definition is made generally applicable to all of the sections of the revenue act and was carried forward from earlier acts which contained no gift tax provisions. See § 2(a)(1) of the 1926 Revenue Act, 44 Stat. 9; § 701(a)(1) of the 1928 Revenue Act, 45 Stat. 878. The section means no more than that the word "person" in any section of the act in which it occurs may be taken as meaning "trust" rather than "individual" as the context may require. But § 504(b), allowing the deduction in the case of each gift to any person when applied to gifts in trust for designated beneficiaries, may be read as referring either to a gift to the trust or a gift to each individual beneficiary. Hence we must read the section in its setting of the gift tax provisions and in the light of its legislative history, to determine whether, within its meaning, the trust or each individual beneficiary is the donee to whom the gift is made.

The gift tax provisions are not concerned with mere transfers of legal title to the trustee without surrender by the donor of the economic benefits of ownership and his control over them. A gift to a trustee reserving to the donor the economic benefit of the trust or the power of its disposition, involves no taxable gift. It is only upon the surrender by the donor of the benefit or power reserved to himself that a taxable gift occurs. *Sanford's Estate* v. *Commissioner,* 308 U. S. 39; *Rasquin* v. *Humphreys,* 308 U. S. 54, and it would seem to follow that the beneficiary of the trust to whose benefit the surrender inures, whether made at the time the trust is created or later, is the "person" or "individual" to whom the gift is made.

But for present purposes it is of more importance that in common understanding and in the common use of language a gift is made to him upon whom the donor bestows the benefit of his donation. One does not speak of making a gift to a trust rather than to his children who are its beneficiaries. The reports of the committees of Congress used words in their natural sense and in the sense in which we must take it they were intended to be used in § 504(b) when, in discussing § 501, they spoke of the beneficiary of a gift upon trust as the person to whom the gift is made. Similarly they spoke of gifts effected by transfer of money or property to another as consideration for the payment of money or other property to a third person as a gift to the third person. H. Rept. No. 708, 72d Cong., 1st Sess., pp. 27-28; S. Rept. No. 665, 72d Cong., 1st Sess., pp. 39-40. It is of some significance also that the denial by § 504(b) of the exemption in the case of gifts of "future interests" has little scope for practical operation unless the gifts to which the exemption applies include those gifts made to beneficiaries of a trust since it is by resort to the conveyance in trust that most future interests are created.

Moreover, the very purpose of allowing a gift tax exemption measured by the number of donees, would be defeated if a distinction were to be taken between gifts made directly to numerous donees and a gift made for their benefit by way of a single trust, and we are unable to discern in the statute or its legislative history any purpose to make such a distinction. While one object of the exemption was to permit small tax free gifts, and at the same time "to fix the amount sufficiently large to cover in most cases wedding and Christmas gifts" without the necessity of keeping accounts and reporting the gifts, H. Rept. *supra,* 29; S. Rept. *supra,* 41, never-

theless the statute extended the exemption in the specified amount to all gifts, whether large or small, "made to any person".

In the face of an exemption thus made broadly applicable to all gifts to all donees and in the absence of some indication of an intention to discriminate between gifts made directly to the donees and those made indirectly to the beneficiaries of a trust, we can hardly assume a purpose to favor one class of donees over the other or find such a purpose in the words of the statutory definition of "person" which may indicate either the trust or each individual beneficiary of the trust as the person to whom the gift is made. Further, such an assumption would open the way to avoid the $5,000 limitation upon the allowed exemption, by resort to the simple expedient of the creation by a single donor of any number of trusts of $5,000 each for the benefit of a single beneficiary.[1] A construction so dependent upon an artificial meaning of the words of the statute and so out of harmony with the statutory scheme and purpose is not to be favored.

Article 11 of 79 Treasury Regulations (1933 edition), issued under the 1932 Act treats each gift to the beneficiary of a trust as entitled to the benefit of the $5,000 deduction unless the gift is of a "future interest" which § 504(b) excepts from the exemption otherwise allowed. Such we think is the correct construction of the statute.

It is unnecessary to consider here the question whether a gift upon trust for impersonal, public or charitable purposes where there are no designated or ascertainable first beneficiaries is a gift to the trust entitled to a single $5,000 deduction. See *Helvering* v. *Hutchings,* 111 F. (2d) 229, 231. Nor do we consider whether the gifts to the beneficiaries here are of future interests which are excepted from the benefit of the $5,000 deduction allowed by § 504(b). That question is not presented by the petition for certiorari. But our judgment will be without prejudice to consideration of that question by the Board of Tax Appeals upon the remand to it if, under the rules and procedure governing proceedings before the Board, the Commissioner is free to present the question there.

Affirmed.

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[1] It was this construction of the statute by the Board of Tax Appeals and by "several of the federal courts" which lead to the amendment of § 504(b) so as to withdraw the exemption in the case of every gift in trust. See § 505 of the 1938 Act, 52 Stat. 447. S. Rept. No. 1567, 75th Cong., 3rd Sess., p. 41.